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No. 84-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WEYERHAEUSER COMPANY,
Petitioner,

v.

TRANS-PACIFIC SHIPPING CO., as successor in interest to
WESTERN SEAS SHIPPING COMPANY,
EASTERN SEAS SHIPPING COMPANY, and
KARLANDER (AUSTRALIA) PTY. LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

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G. Gilmore & C. Black, Jr., *The Law of Admiralty*, (2d ed. 1975) 3, 4

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Respondents, in their opposing briefs in this matter, have substituted rhetoric and error for any serious analysis of the issues presented by Weyerhaeuser's petition. Weyerhaeuser need not burden the Court with a point by point rebuttal of respondents' generally peripheral contentions. It respectfully suggests, however, that respondents' arguments lack merit in several material respects.

1. The respondents (and especially Karlander), in a vain attempt to argue that no conflict exists between the Ninth Circuit's opinion below and the Second Circuit's

decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), assert that the court in *Compania Espanola* did not decide what it clearly did decide. Karl. at 3; Trans Pac. at 4. In essence, both respondents argue that the Second Circuit did not decide, *or did not need to decide*, whether a federal district court has the authority to order consolidation of separate arbitrations concerning common questions of law and fact. Regardless of whether the Second Circuit needed to decide this question (which goes to the merits of the Second Circuit's rule and not to whether a certiorari-worthy conflict exists), it is quite clear that the argument advanced by respondents is simply wrong. As respondent Trans-Pacific itself notes, federal district courts in the Second Circuit "have blindly followed" the rule that a district court may order consolidation. Trans Pac. at 4. Having conceded (as they must) that all these district courts have read *Compania Espanola* as establishing this rule, how can respondents steadfastly refuse to admit that *Compania* stands for such a proposition?

2. Karlander facilely suggests that the Ninth Circuit's decision in this case presents no problems of confusion or uncertainty because parties to charter agreements may choose the rule they want applied concerning the question of consolidation merely by inserting in the charter party "New York" or "San Francisco" as the situs of any arbitration that arises. Karl. at 8. This suggestion, however, does nothing for charterers (such as Weyerhaeuser) who are already parties to *existing* charter agreements in which "Seattle" or "San Francisco" has been designated as the location for any arbitration that takes place. *See* Pet. for Certiorari at 15-16. Moreover, Karlander's suggestion overlooks the practical reality that charter agreements are usually arrived at by telex between commercial men who may or may not be familiar

with all the nuances of what Karlander calls the "cloudy opinion in *Compania Espanola*." Karl. at 3.[1]

3. The respondents argue that there is "no problem" as to admiralty uniformity. Karl. 9; *see also* Trans. Pac. at 8. They seem to confuse the question of general uniformity in doctrine with the right of parties to contract for a special rule in their own case. It is well known that ships are frequently chartered and subchartered, and subsubchartered. In such a complex commercial environment, the risk of uncertainty and dispute is greatly enhanced if there is confusion as to the underlying rule against which the parties are contracting. Weyerhaeuser proposes a clear and well-established rule: that consolidation can be ordered (as it was in *Compania Espanola*) when the interests of justice are served thereby. The practical difficulties inherent in Karlander's suggestion that the rule can turn on whether the parties designate "New York" or "San Francisco" as the arbitration situs underscores Gilmore and Black's point (quoted by Trans-Pacific at 8) that, "[t]he law of charters is . . . federal law, as to which uniformity is required." G. Gilmore & C. Black, Jr., *The Law of Admiralty* 196 (2d Ed. 1975).

4. Both Karlander and Trans-Pacific devote a considerable portion of their briefs to the argument that the hold-harmless clause in the addendum to the head charter between Trans-Pacific and Weyerhaeuser somehow prevents consolidation of the two arbitrations at issue in this case. Karl. at 6; Trans-Pac. at 5. This argument is, quite simply, wholly lacking in merit. The clause in the contract itself states that Weyerhaeuser shall hold "'[Trans-Pacific] harmless from and against all losses, costs, risks or expenses of any nature whatsoever suffered by [Trans-Pacific] during such sublet, which *would not*

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[1] Arbitration situs has been traditionally selected for the convenience of the parties. Karlander would import into the choice a forum-shopping element which may be at odds with the parties' natural instinct and/or convenience.

have been otherwise incurred by [Trans-Pacific] had the vessels not been sublet to Karlander. . . .'" Pet. for Certiorari, Appendix 1, at A-4 (emphasis added).[2] Had Weyerhaeuser wished to stow containers below the decks of the PACDUKE and PACDUCHESS, precisely the same dispute would have arisen between Trans-Pacific and Weyerhaeuser as currently exists between Weyerhaeuser and Karlander. Nowhere in its brief does either respondent suggest how this dispute and consolidated arbitrations concerning it are within the scope of the hold-harmless clause.[3]

5. Respondents offer bald assertions that the use of arbitration will not be discouraged by the decision below. Trans-Pac. at 8; Karl. at 10. The respondents do not deny (as they cannot) that separate arbitrations are likely to be more expensive and time consuming than a consolidated arbitration. See Trans-Pac. at 8-9. Instead, they are content to argue that, even with the Ninth Circuit decision, "[t]he arbitration procedure remains as an expedient and inexpensive means for maritime interests

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[2] Both respondents and the Ninth Circuit neglected to point out that the clause continued, "but it is not intended to place on [Weyerhaeuser] any obligation relating to the *navigation or management of the vessel.*" CR 32-33 (emphasis added). This is consistent with standard practice under a time charter, where the vessel remains under the owner's control and management. G. Gilmore & C. Black, Jr., *The Law of Admiralty* 193-94 (2d ed. 1975). It is totally inconsistent, however, with Trans-Pacific's glib suggestion to this court that it expected it "would be insulated by Weyerhaeuser from any involvement whatsoever with Karlander." Trans-Pac. at 5.

[3] Likewise, given the nature of a time charter and the dispute at the core of this case, it is particularly unclear how Trans-Pacific can support its claim that Weyerhaeuser "assumed duties owing to Trans-Pacific which were greater and materially different from the duties owed by Karlander to Weyerhaeuser." Trans-Pac. at 5. The dispute here had concerned "the navigation or management of the vessel", where Trans-Pacific's duties were identical under both the charter and the subcharter. This being so, it is hard to see how Trans-Pacific's statement is relevant or true.

to resolve their disputes." Trans-Pac. at 8. This misses the obvious practical point: the arbitration process remains attractive only to the extent that it is cheaper and swifter than judicial remedies; to the extent that these advantages are reduced, *some* parties will foreswear the arbitration process and rely on judicial remedies. How large or small this group may be is something that neither petitioner nor respondents know. If respondents have their way, however, the federal courts will find out in due course.

6. Respondents' reluctance to participate in consolidated arbitrations and their whipsaw tactics in this case mimic the tactical posturing displayed by the party opposing consolidation in *Compania Espanola*. The Second Circuit stated there that "if successful, this strategy would be very advantageous to [the party opposing consolidation] and very prejudicial to [the other parties] . . . ." 527 F.2d at 970. Recognizing this, the court confirmed the authority of a district court to consolidate arbitrations in part because of the "great and irreparable injustice" that can result to the common party in the absence of consolidation, 527 F.2d at 968, and because the "interest of justice" is served by obviating the possibility of conflicting findings through consolidation of the arbitrations. 527 F.2d at 974. In the instant matter, respondents seek to hide behind technical common law concepts such as "privity," Karl. at 6, and "novation," Trans-Pac. at 3, in order to pursue their tactical objective of separate arbitrations.[4] Not surprisingly, neither re-

[4] The respondents' tactical goals are obvious. See Petition for Certiorari, 18-19 n. 17. Karlander wishes to try its claim that the owner's refusal was unreasonable against Weyerhaeuser, which it knows does not directly possess the evidence necessary to defend the claim. Meanwhile, Trans-Pacific wishes to have two bites at the apple on liability: it wants Weyerhaeuser to defend the claim (presumably with evidence obtained from Trans-Pacific) in the first arbitration; and, if Weyerhaeuser is unsuccessful, then it wishes to be able to re-litigate the same issues against Weyerhaeuser

spondent, at any point in its brief, addresses the Second Circuit's very legitimate concerns regarding "the interest of justice" and "danger of conflicting findings." 527 F.2d at 974. The court in *Compania Espanola*, unlike the Ninth Circuit, recognized the injustice of the tactics used by respondents here and held that district courts may consolidate arbitrations in such instances. 527 F.2d at 975. This Court should grant certiorari in the instant matter so that it may review and reverse the contrary decision of the Ninth Circuit.

Respectfully submitted,

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before a different arbitral panel. In each arbitration, Weyerhaeuser is inevitably at a disadvantage vis-a-vis a party with direct evidence on the conflict. Respondents know this and that is why they are fighting so hard to avoid the teaching of *Compania Espanola*.